HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 575

JOHN NICHOLAS DONADUCY,
Appellant,

v.

COMMONWEALTH OF PENNSYLVANIA.

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Reports Below

The opinions below have not been reported. The opinion of the trial court and the Superior Court of Pennsylvania are annexed as Appendix I and II respectively. The Supreme Court of Pennsylvania did not deliver an opinion.

Grounds on Which Jurisdiction is Invoked

i. **The nature of this proceeding:** This appeal is taken pursuant to 28 U.S.C., Section 1257(2), and there is drawn in question the validity of a state criminal libel statute, as construed and applied, on the ground of its thus being repugnant to the Constitution of the United States. This is an appeal from the affirmance by the Superior Court of Pennsylvania, the Supreme Court of Pennsylvania having denied leave to appeal, of the conviction of John Nicholas Donaducy for violation of the Criminal Libel Statute of Pennsylvania (Pennsylvania Act of June 24, 1939, P. L. 872, Par. 412, 18 P. S. Sec. 4412), as construed and applied, which decision upheld the validity of the said state statute.

ii. **The judgment sought to be reviewed** was dated and entered July 13, 1954. No order was sought or made respecting a rehearing. The Supreme Court of Pennsylvania denied leave to appeal in a judgment dated and entered September 10, 1954. The notice of appeal to this Court was filed in the Supreme Court of Pennsylvania (Western District) on December 8, 1954.

iii. **The statutory provision** believed to confer on this Court jurisdiction of the appeal is 28 U.S.C. §1257(2).

iv. **Cases believed to sustain the jurisdiction:** *Beauharnais* v. *Illinois*, 343 U. S. 250 (1952); *Winters* v. *New York*, 333 U. S. 507 (1948); *Terminiello* v. *Chicago*, 337 U. S. 1 (1949); *Chicago, R. I. and P. R. Co.* v. *Perry*, 257 U. S. 548 (1922); *Charlston Federal Savings and Loan Association* v. *Alderson*, 324 U. S. 182 (1944); *Missouri* v. *Mayfield*, 340 U. S. 1 (1950).

v. **State statute involved:** The validity of the Criminal Libel Statute of Pennsylvania, as construed and applied, is involved. This is its text:

> "18 P. S. Sec. 4412. *Libel.*—Whoever writes, prints, publishes or exhibits any malicious or defamatory libel, tending either to blacken the memory of one who is dead, or the reputation of one who is alive, thereby exposing him to public hatred, contempt or ridicule, is guilty of libel, a misdemeanor, and on conviction, shall be sentenced to pay a fine not exceeding five hundred dollars ($500), or undergo imprisonment not exceeding one (1) year, or both." Penna. Act of June 24, 1939, P. L. 872, Par. 412, 18 P. S. Sec. 4412.

Questions Presented

1. Whether the criminal libel statute of Pennsylvania is repugnant to the Fourteenth Amendment to the U. S. Constitution, because violative of the right to due process

of law, when construed and applied (in the court's charge to the jury) to permit thereunder a conviction of a publisher of a newspaper of general circulation, the statute being construed and applied as one whose overall purpose is to suppress scandal held not to be "for the public good" —without "the public good" being anywhere further defined; without any proof that the libelous utterance was one which tends to breach the peace; and without any proof of malice, though the statements published constituting the libel were already a matter of public record of a pending case, having come from a Bill of Particulars filed in a divorce suit in Erie, Pennsylvania.

2. Whether the criminal libel statute of Pennsylvania is repugnant to the Fourteenth Amendment to the U. S. Constitution, because violative of the right to due process of law, when construed and applied (in the court's charge to the jury) to permit a conviction of a publisher of a newspaper of general circulation thereunder, truth being no defense to such a prosecution though combined with the good motive of wanting to inform the public and blot out moral wrongs.

Statement of the Case

The appellant, John Nicholas Donaducy, is editor and publisher of a newspaper of general circulation in Erie, Pennsylvania, the "Town Crier" (R. 2).[1] Donaducy was charged with criminal libel (R. 10), sentenced to from

(1) Such references are to the pages as numbered in the certified record. The Prothonotary (Clerk) of the Penn. Supreme Court (who is also the Prothonotary of the Superior Court of Pennsylvania) has also certified to this Court two documents which were submitted to the latter Court at the argument of this case: The Brief of the American Civil Liberties Union, *Amicus Curiae*, and a copy of the original testimony at the trial. Citations to pages of the said brief will be made as "ACLU "; citations to pages of the testimony will be made as "Tr. ". Appellant had asked that the brief

three months to a year in the workhouse[2], for publication of an article in the said paper entitled SLEUTH FOCUSES BINOCULARS ON COUPLE IN BACK SEAT. The article told how a professional detective observed a bartender "and a buxom brunette of Latin vintage, employed by the state to attend the needs of the indigent," during their nocturnal excursions. The article states that the detective recorded three acts of unchastity committed in the bartender's automobile. It further states that the wife applied for a divorce, charging adultery. The bill of particulars filed in that case had charged the keeping of open and notorious company with the social worker (R. 8). Such a document is public property in Pennsylvania, there being no requirement in that state of secrecy of papers in matrimonial actions.

The state's case showed only the following: 1) publication of the offending article; 2) none of the other social workers who attended the needs of the indigent in the county resembled one LaVerne (Mary) Chellis, the co-respondent in the divorce case (R. 7)[3]; 3) Miss Chellis denied some acts of unchastity (R. 8).

Defendant's case produced the testimony of the private detective (a deputy sheriff) to confirm that he had been

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and testimony be included in the transcript to be prepared by the Prothonotary (Notice of Appeal, R. 42, Nos. 15, 16).

References will be made to the transcript of testimony only when testimony is not adequately summarized in the Judge's summary of the facts in his charge to the jury (R. 5-13).

(2) A certified copy of the sentence is included in the papers filed herewith. Appellant had asked this to be included in the transcript to be prepared by the Prothonotary (Notice of Appeal, R. 42, No. 5).

(3) No point was made by defendant's trial counsel that the state failed to prove that there was no one else employed by the *state* or by any *other county* to attend the needs of the indigent who could have satisfied the description in the "Town Crier"; the prosecution's proof went only to those employed by Erie County, though the article in question referred to the "buxom brunette" as one employed by the *state* (R. 2).

hired to spy upon the reported wrongdoings of the husband (through use of eyes and binoculars) and had made reports on the matter to the wife (R. 8). Defendant testified that he had been publishing his papers for 10 years, had never known the co-respondent before the divorce petition against her had been instituted, had first learned of the case in a restaurant, but did nothing until after the publication of the names of the individuals concerned (including Miss Chellis) in the "Erie Dispatch" (Tr. 24), and had no ill feelings or malice against any of the individuals involved (R. 8). He explained that he happened to write the particular article because, among other things, he is in the newspaper business (Tr. 23), that he had done nothing until he had seen the divorce notice in the "Dispatch", had then made a pretty thorough investigation, including an examination of the court records (R. 8-9), and hoped through publication to help bring the family together again, and to expose such cases because of the alarming number of divorces (R. 11, Tr. 25). He had read all of the detective's reports (R. 8-9).

Donaducy was not cross-examined, nor was there any evidence introduced to contradict the statements he had made. The court, in its charge to the jury construed and applied the criminal libel statute as one whose "overall" purpose is to suppress scandal sheets and scandal sheets held not to be for the public good—without the public good being anywhere further defined. The court did not require any proof that the libelous utterance was one which tended to breach the peace, nor did it require any proof of express malice, nor did it find any excuse for defendant's behavior in that the facts published constituting libel were already a matter of public record of a pending case, having come from a bill of particulars filed in a divorce suit. The court further stated the truth was no

defense to such a prosecution even when combined with a good motive of wanting to inform the public and blot out moral wrongs, but that the only question was whether defendant in his own mind intended to do good. Any additional purpose, said the Court, would require a finding of guilt. To quote the charge:

> "The reason for this statute seems to be, and comments in the cases are to the effect that many people sometimes get into situations which are not anything to their credit but it does no good, in fact, it does harm to broadcast it by publications of this kind. In other words, general scandal concerning anybody and everybody, regardless of consequences, is held to not be for the public good, so that you are not interested in this prosecutrix in this case. This is not a damage suit whereby she claims money. This is a prosecution by the state of Pennsylvania for the overall reason that what might be generally called scandal sheets should be suppressed. In that I am not insinuating that this is a scandal sheet, but I mean that is the general overall purpose of this statute. So you will read the article and you must determine, first, was this prosecutrix intended and would that article hold her up to contempt and ridicule? If you do not find that true then there is no guilt. If you find it true then you go on to the next point. Is it true? In the first instance, even the truth of the article is no defense because, as I have told you, the policy of the law seems to be that it does no good to publish even the truth about people unless there is a justifiable purpose.
>
> "If you will recollect it says: Whoever publishes any malicious and defamatory libel. That means that there must be malice involved. In this sense it does not mean a malicious intent towards an individual. It means an actual, positive intent to publish that defamatory article about an individual, not

with a personal animosity, but a deliberate publishing of it knowing that the context of the article will hold a person up to ridicule or is likely to, will tend to, so the truth of the accusation is not in itself a defense, with this qualification: sometimes it is in the interest of the public good, for the welfare of the public, that a defamatory article might be published, and if it is for the public good and honestly intended for the public good and for no other purpose, then that removes the item of malice, as I have described it, so that if you find that this article was not true or sufficiently true to justify it—there is some question on the facts on that point and in all its details—if you find it was not true and it did hold this object of the article up to ridicule, then the defendant is guilty.

"If you find the article substantially true, then you will go to the next point: was it justified in any way? If you find that this was published and it was intended for this purpose and the contents were such as would hold her up to ridicule and the defendant goes on as he did during this trial to justify it in the interests of the public, in order to remove the element of malice, then he must go forward with testimony which will satisfy you on that point.

"Maybe I should repeat and say the publishing of it, even true, as I told you, is not justified in the first instance because it does no good in many cases, and no publisher of a paper can put in anything he wants to and then defend it on the ground that it is true. You can see that would do a great harm. But if it is proved that it is a subject which holds a person up to ridicule, and if you find it is true, then you may free the man who did it, the publisher, if the publishing of it was reasonably intended, under all the evidence, to do public good rather than just report scandal.

"He says he published it not with the intention of hurting anybody but in the thought that maybe by publishing that article about this lady and Mr. Fry he could get Mr. and Mrs. Fry back together again. That is one of the reasons. Then the other reason is that he thought it was for the public benefit that this incident should be published, and he said to get this information he heard it in the first instance at a restaurant, then asked Mrs. Fry and asked the detective and searched the court records.

"The method in which this came to him and all of the circumstances are for you in determining what was in his mind when he published this article and it will help you in determining whether it was for the purpose of doing good or whether it wasn't, and we express no opinion one way or the other. You are the jury. We are not trying to usurp your position on the finding of these facts" (R. 9, 10, 11).

No federal questions were raised in the court of first instance. However, on appeal to the Superior Court of Pennsylvania, the constitutional questions were raised in an *amicus curiae* brief of the American Civil Liberties Union, filed in the said court and a part of the record here, which brief took the position that Pennsylvania's criminal libel law is unconstitutional and violative of the First and Fourteenth Amendments when applied to a case in which the libel does not tend to breach the peace, and that the statute violated the First and Fourteenth Amendments to the U. S. Constitution when construed as having the purpose of suppression of general scandal, and by preventing the jury from considering the defense of truth and proper motive through this definition (ACLU, pp. 4-9). The Superior Court ruled, however, that the charge contained no error, in the following words:

"The defendant further contends that the court erred in its charge and, therefore, a new trial should be granted. This matter is not properly before us inasmuch as it was not raised in the court below—understandably so because the defendant made no motion for a new trial. *We might add parenthetically, however, that an examination of the charge discloses no error.*" (R. 24) (Emphasis supplied.)

Appellant thereupon petitioned the Supreme Court of Pennsylvania for the allowance of an appeal, raising the federal questions as follows:

"(B) Has not the Trial Judge committed reversible error, violating appellant's constitutional right of free press and denying to the appellant due process of law, where he fails to instruct the jury on a fundamental issue, to-wit, that the libelous utterance in order to be criminal must tend to breach the peace? It is respectfully submitted that the question should be answered in the affirmative.

"(C) Is not the appellant being denied due process of law and being deprived of his constitutional right of free press where the Trial Court fails to set forth any applicable standard to guide the jury in their determination of whether or not the article as written was or was not for the public good? It is respectfully submitted that the question should be answered in the affirmative." (R. 29)

"(B) The intention of the appellant was not to vilify the name of anyone and, in fact, the article names no one, but rather to point out as an editor and publisher a moral wrong and in his own way attempt to blot it out.

"(C) The facts published in the article were already a matter of public record of a pending case; the information obtained for the article having come

from a Bill of Particulars filed in a divorce suit in Erie County, Pennsylvania.

"(D) Newspapers of general circulation for and in the public interest often report alleged scandals of record in Courts of Law in order to inform and to educate the public for their benefit and well being. If they are to be prohibited from reporting legal proceedings, their function in the public interest would be completely abrogated.

"(E) The Trial Court stated that the general overall purpose of the criminal libel statute was to suppress scandal sheets and made it clear that he was not insinuating that the 'Town Crier' was a scandal sheet. However, he said:

> '* * * general scandal concerning anybody and everybody, regardless of consequences, is held not to be for the public good * * *'

And further on:

> '* * * sometimes it is in the interest of the public good, for the welfare of the public, that a defamatory article might be published * * *'

The charge as made fails to set forth any standard from which the jury would be able to more accurately determine when scandal might be in the public good and when it might not be." (R. 30)

While the Supreme Court of Pennsylvania did not hand down any written opinion in denying the petition for allowance of an appeal, nonetheless it is obvious that it must have passed upon the federal questions[4]—for unless

(4) In Pennsylvania, it does not seem to be necessary for constitutional questions of fundamental basic error to be raised in the court of first instance, but such a question may be considered if presented for the first time on appeal. *Gordon* v. *Hartford Sterling Co.*, 319 Pa. 174, 177, 179 Atl. 234, 236 (1935):

it felt that there was some federal question involved presenting a proper ground for appeal or petition for certiorari to the U. S. Supreme Court, why then did it permit the defendant to be free (without even posting bail) pending appeal to this Court (R. 39)?

Substantiality of Federal Questions

Even if this case involved only the slightest infringement on freedom of speech, that infringement should be cured. As Justices Van Devanter, McReynolds and Butler have stated,

> "The destruction or abridgment of a free press * * * would be an event so evil in its consequences that the least approach toward that end should be halted at the threshold." *Associated Press* v. *NLRB*, 301 U. S. 103, 136 (1937).

"At no time during the progress of the litigation was the question raised that the proposed order would violate rights protected by the Federal Constitution. Where a question is presented for the first time to an appellate court, that court will not consider it on appeal unless it involves error that is basic and fundamental." Accord: *Com.* v. *Klick*, 164 Pa. Superior Ct. 449, 453, 65 A. 2d 440, 442 (1949), where the court did consider the constitutional issue raised even though it was not properly before it.

Indeed, the rules of the Pennsylvania Supreme Court require only that federal constitutional questions be raised in the cause prior to its *own final decision:* "A Petition for the Allowance of an Appeal to the Supreme Court of the United States to review a final judgment or decree of this court must * * * show that such [federal constitutional] question was clearly raised in the cause prior to the final decision of this court." Rule 71, Supreme Court of Pennsylvania, Rules, Penna. Stat. at page 32.

But the question involved here is vital. It is whether a newspaper publisher can be sent to jail in the United States for publishing an account of a pending judicial proceeding. If the decision below were allowed to stand, then every newspaper publisher in Pennsylvania and the other 47 states is threatened with a jail sentence for fair reporting of a matter of public record in a court, affecting a public employee, merely because it involves the dissemination of scandal. What the courts below have ignored is that dissemination of scandal is a prime function of our press—whether the scandals be in the domestic affairs of our public employees and their morality, once the scandal has found its way into the court room, or whether the scandals involve 5-percenters, or arise from a Kefauver investigation, or from an attack by Senator McCarthy about Communists in the State Department, or a charge of violation of law by patent infringement. No newspaper could ever report the filing of a complaint for alleged police brutality under the decision below without running the risk of being prosecuted for criminal libel should it be determined that the charge is false. To state that there is a defense of truth with good motives is to misstate the case below. For such a defense was illusory. The court did not direct the jury as to what good motives were, but in effect told them that dissemination of scandal was a bad motive and that they were then to decide for themselves under that standard alone whether there was a motivation towards the public good. Any additional motive, indeed, required a finding of guilt. In short, if the decision below is allowed to stand, no newspaper is safe in reporting any item of scandal even if it does not name the person involved. If newspapers are to be prohibited from reporting scandals then their function as watchdogs of the public would be completely abrogated.

This court has held that any publication principally made up of criminal news, police reports, or accounts of criminal deeds, among other things, are as much entitled to free speech as the best of literature. *Winters* v. *N. Y.*, 333 U. S. 507 (1948). So far as we are aware, this Court has not previously ruled upon cases involving criminal libel of individuals. Indeed, criminal libel cases have been infrequent and generally innocuous. See *Beauharnais* v. *Illinois*, 343 U. S. 250, 298 (1952) (Mr. Justice Jackson dissenting). And while criminal libel laws and ordinances are not *per se* violative of free speech,

> "While this Court sits it retains and exercises authority to nullify action which encroaches on freedom of utterance under the guise of punishing libel." *Id.* at 263, 264.

We submit that the conviction in the case at bar was action which encroaches upon freedom of utterance under the guise of punishing libel, and that this Court should exercise its authority to nullify such action. We point out, moreover, that the traditional justification for punishing libels criminally is the "tendency to cause breach of the peace." *Id.* at 254. We submit that surely it was illusory to expect any breach of the peace from the publication complained of herein. We point out that as construed and applied herein, the statute is unrelated to any evil other than the dissemination of scandal, that the dissemination of scandal recorded in a judicial proceeding involving a public employee, if evil, is protected by the First Amendment, which has embodied the thought that the interest of the free press requires that even the dissemination of scandal be permitted. Surely the questions raised herein are of primary importance, affecting as they do every newspaper and every publisher of every magazine in the

United States. Many of our city tabloids could not be published if other states chose to enact and construe criminal libel laws as Pennsylvania has done with hers. We believe that the questions involved herein are of such substantial importance as to require plenary consideration with briefs on the merits and oral arguments for their resolution. We point out that in a case of this sort any doubts as to this court's jurisdiction should be resolved in favor of appellant, for all newspapers in Pennsylvania would have to operate under the criminal libel law in Pennsylvania as it has been construed and applied. Thus, unless the law is upset in this case, all newspapers and magazines in Pennsylvania will, if they are to abide by the law, have to curtail their freedom of expression. Their good motive of informing the public will avail them nothing, even if the matters they write about are true. Some other motive, never defined, must be found. Under these circumstances, the decision below standing on the books represents a severe threat to freedom of expression, for doubtless publishers will go timidly and not seek to transgress the libel law rather than risk imprisonment for a year as the result of testing it.

This Court stated in *Beauharnais* v. *Illinois* that the doctrine of fair comment is indispensable to the democratic political process. 343 U. S. at 263, Note 18. While the language was used by the Court in reference to political comment, it seems obvious that fair comment or fair reporting of judicial proceedings involving public employees may well be as indispensable to the democratic process as political comment. Should the decision below stand it might even be contended that a reprint of the article complained of, taken from the record in this Court, with full comment upon the disposition of the proceedings, was itself a violation of the criminal libel law. While we

are sure that this Court would move swiftly to strike down any such prosecution, we point out nonetheless, the statute as construed and applied below might well invite such a result. The statute below was construed to be so vague that it would certainly punish speech which is constitutionally protected. "Where a statute is so vague as to make criminal an innocent act, a conviction under it cannot be sustained." *Winters* v. *N. Y.*, 333 U. S. 507, 520 (1948).

If the least threat to freedom of expression must be stifled at the onset, the clear and present danger to freedom of expression in Pennsylvania through its criminal libel law must be stifled. The "bad odor of criminal libel" (Mr. Justice Black dissenting, *Beauharnais* v. *Illinois*, 343 U. S. at 272), must not be allowed to permeate our shores.

* * *

There remains solely the question of whether proper procedures were utilized below upon which this Court can base jurisdiction, any doubts as to which, as we have stated above, should be resolved in favor of appellant in view of the threat to freedom of the press in Pennsylvania.

While no constitutional questions were raised in the trial court, this is not considered a bar to this Court's assertion of jurisdiction if the appellate courts considered and passed upon the constitutional questions. *Chicago, R. I. and P. R. Co.* v. *Perry*, 257 U. S. 548 (1922). "There can be no finding of waiver of objections to the validity of a statute when the statute is the essential foundation upon which the judgment rests." *Id.* at 552. This Court "need not inquire how and when the question of the validity of the statute was raised when such question appears to have been actually considered and decided by [the state court of

last resort]." *Charlston Federal Savings and Loan Assn.* v. *Alderson,* 324 U. S. 182, 185-6 (1944). And it is the record that is determinative of this question, not what the state court of last resort said. *Id.* at 186. The Superior Court here found no error in the charge, though constitutional questions were raised, and the State's Supreme Court must have decided the constitutional issues for otherwise it would not have granted defendant his freedom without bail pending appeal to this Court.

At worst there may be some doubt as to whether the State Supreme Court decision rested upon a federal or a non-federal ground. In such a case, this Court has not hesitated to accept jurisdiction, state what the federal law is and vacate the judgment, remanding the cause for further proceedings to determine whether the basis for the decision was the federal question and if so, the court below was instructed to give proper resolution to the federal question. *Missouri* v. *Mayfield,* 340 U. S. 1 (1950).

Indeed, this Court has not hesitated to decide constitutional issues which were not even raised in state court proceedings. *Terminiello* v. *Chicago,* 337 U. S. 1 (1949). Mr. Justice Frankfurter, dissenting, described what the majority had done in these words: "Thus, an objection, not raised by counsel in the Illinois courts, not made the basis for the petition for certiorari here—not included in the 'Questions Presented', nor in the 'Reasons Relied on for the Allowance of the Writ'—and explicitly disavowed at the bar of this court, is used to upset a conviction which has been sustained by three courts of Illinois." *Id.* at 9. Mr. Justice Frankfurter pointed out that the central point upon which the Court disposed of the case "was not mentioned by the Illinois Supreme Court in its careful opinion." *Ibid.* Surely we are on better ground here. The constitutional questions were raised in the *amicus curiae* brief of the American Civil Liberties Union in the

Superior Court of Pennsylvania and raised by appellant himself in his Petition for the Allowance of an Appeal to the Supreme Court of Pennsylvania. The majority in *Terminiello* pointed out that it was immaterial as to just what constitutional questions had been raised, that "the pinch of the statute is in its application. It is that question which the petitioner has brought here." *Id.* at 5. It is that question which Donaducy has brought here too.

We thus believe that jurisdiction may be asserted by this Court not only because the appellate courts of Pennsylvania considered and passed upon the constitutional questions, but also because they should at least be given an opportunity to apply the proper federal constitutional questions or decide the case on the basis of state law.[5] The action of the Supreme Court of Pennsylvania clearly demonstrates that the constitutional questions were decided. We assert moreover, that this case requires a grant of jurisdiction under the doctrines enunciated in *Terminiello.* This Court implied in *Beauharnais* that it would have considered and passed upon constitutional considerations raised for the first time in this Court. 343 U. S. at 264-5.

There is appended to this statement, as Appendix III, a copy of the judgment sought to be reviewed.

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(5) This Court has gone even further and has not hesitated to remand a case on grounds based upon inquiries from its own bench and never suggested by either counsel at any stage of the proceedings. *Musser* v. *Utah,* 333 U. S. 95 (1947).

CONCLUSION

For the reasons stated above this Court should note probable jurisdiction, and the judgment below should be reversed.

Respectfully submitted,

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APPENDIX I

IN THE

COURT OF QUARTER SESSIONS OF THE PEACE

For the County of Erie, Pennsylvania

Commonwealth of Pennsylvania v. John Nicholas Donaducy	No. 117 May Sessions, 1953

Opinion

Evans, P. J.

The defendant in the above entitled case has taken an appeal to the Superior Court of the State of Pennsylvania from an order of this Court dated December 15, 1953, reading as follows: "The rule to show cause granted September 21, 1953 on defendant's motion in arrest of judgment is discharged and the motion refused."

It therefore becomes necessary for us to set forth for appellate review our reasons for the above-recited order.

There is but one question raised, and that is the sufficiency of the indictment upon which the defendant was found guilty of the offense of libel and sentenced to the Allegheny County Workhouse for an indefinite period of not less than three months or more than one year. Prior to the trial, defendant filed a motion to quash the indictment for the reason that it failed to charge or properly charge any offense. This motion was dismissed. After the jury's verdict was returned, a motion in arrest of judg-

ment was filed citing in support thereof the following reasons: (1) The indictment did not properly charge an offense; (2) The Court did not have proper jurisdiction of the cause; (3) The defendant was convicted of an offense of which he could not be convicted under the indictment; (4) The Court refused to quash the indictment.

These four reasons, in essence, raise the same contention previously advanced in the motion to quash the indictment, to the effect that the averments in the indictment are insufficient to support a trial and conviction on the charge of libel. In the indictment it is averred that the defendant, "unlawfully and maliciously contrived and intended to injure and vilify the good name and reputation of one LaVerne Chellis who on the day aforesaid and long prior thereto was and has been a good and lawful citizen of the City of Erie, County of Erie and State of Pennsylvania, and to expose the said LaVerne Chellis to public hatred, contempt and ridicule, did then and there unlawfully, willfully and maliciously compose, write, and did willfully, maliciously and unlawfully print and publish in a certain newspaper of general circulation, to wit 'Jack Ducy's Town Crier', a certain false, scandalous, malicious and defamatory libel of and concerning her, the said LaVerne Chellis, according to the tenor following, that is to say * * *." Thereafter in the indictment was recited the entire article published and wherein the woman involved was referred to as, "a buxom brunette of Latin vintage, employed by the State to attend the needs of the indigent", "social worker's', "couple", "she", "her", the district attorney inserted, "(meaning Laverne Chellis)". After reciting the article in full, the indictment closed with these words, "and by means of publication and circulation of

said false, scandalous, malicious and defamatory libel, he, the said John Nicholas Donaducy (Jack Ducy) did thereby then and there unlawfully, willfully and maliciously expose her, the said LaVerne Chellis, to public hatred, contempt and ridicule, to the great damage, disgrace, scandal and infamy of her, the said LaVerne Chellis, and he, the said John Nicholas Donaducy, did commit the crime of libel, contrary to the form of the Act of Assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania."

An indictment must be drawn with reasonable clearness and certainty to show the substance, time and place of the alleged offense so that a defendant may be informed in an intelligent manner of what he is called upon to answer and be protected against a second conviction of the same offense. No question concerning this rule of law has been raised, but it is contended that the insertion of the parenthetical "meaning LaVerne Chellis" by the district attorney was improper and without it the published article is not self-sustaining. Libelous words must refer to some ascertained or ascertainable person, and the indictment, in the form presented, not only charges that the article was directed toward LaVerne Chellis but also points out the various places in the article wherein said LaVerne Chellis was the person referred to.

To sustain defendant's contention would be to hold that no libel action could be sustained unless the person concerning whom an article is written is specifically named in the article itself. Such rule of law would permit the publication of libel with impunity, with all the identification of the party whose reputation was to be blackened except the actual use of his, or her, given name.

Appendix 1

It is the function of the jury to determine whether or not the publication is a libel and also whether or not the identification of the person involved is reasonably ascertainable.

In our opinion the publication did, with more than reasonable certainty, indicate its direction to LaVerne Chellis, and at the trial the defendant admitted that LaVerne Chellis was the object of his comment, although he did defend the publication as being for the public good. In our opinion the indictment contained all of the information necessary to sustain the charge and fully informed the defendant of every detail upon which he would be required to prepare a defense.

Filed Feb. 3, 1954

APPENDIX II

IN THE SUPERIOR COURT OF PENNSYLVANIA

PITTSBURGH DISTRICT

No. 301.

COMMONWEALTH OF PENNSYLVANIA *v.* JOHN NICHOLAS DONADUCY, *Appellant.*	No. 83 April Term, 1954

APPEAL FROM JUDGMENT OF SENTENCE OF THE COURT OF QUARTER SESSIONS OF ERIE COUNTY AT NO. 117 MAY SESSIONS, 1953.

OPINION BY ROSS, J.

Filed: July 13, 1954

This is a prosecution for criminal libel under the Act of June 24, 1929, P. L. 872, par. 412, 18 PS sec. 4412. Before trial, the defendant filed a motion to quash the indictment, which motion was refused. The jury returned a verdict of guilty, the defendant's motion in arrest of judgment was refused, and after sentence was imposed he took this appeal.

The defendant contends that the court below erred in refusing to sustain his motion to quash the indictment and his subsequent motion in arrest of judgment. Both motions are based upon an alleged infirmity in the indictment in that "it does not set forth extrinsic facts to show the person to whom the publication referred when the pub-

lication itself did not name the person at whom it was aimed." Consequently, the only question before us is the sufficiency of the indictment.

The indictment reads in part as follows: "* * * one JOHN NICHOLAS DONADUCY * * * unlawfully and maliciously contriving and intending to injure and vilify the good name and reputation of one LAVERNE CHELLIS * * * and to expose the said LAVERNE CHELLIS to public hatred, contempt and ridicule, did then and there unlawfully wilfully and maliciously compose, write, and did wilfully, maliciously and unlawfully print and publish in a certain newspaper of general circulation, to wit: 'JACK DUCY'S TOWN CRIER', a certain false, scandalous, malicious and defamatory libel of and concerning her, the said LAVERNE CHELLIS * * *" Thereafter in the indictment was recited the entire article published, the gist of the article being that an unnamed woman, over a period of time, had been having an illicit affair with a married man. The woman was variously described as a "buxom brunette of Latin vintage", a "raven-haired, owl-eyed social worker" and a "home wrecking social worker". On these and other occasions when the person described was allegedly the prosecutrix, LaVerna Chellis, there was inserted in the text of the article as quoted in the indictment the parenthetical phrase "(meaning LaVerne Chellis)".

The indictment concludes: "And by means of this publication and circulation of said false, scandalous, malicious and defamatory libel, he, the said JOHN NICHOLAS DONADUCY (JACK DUCY) did thereby, then and there unlawfully, wilfully and maliciously expose her, the said LaVerne Chellis, to public hatred, contempt and ridicule, to the great damage, disgrace, scandal and infamy of her,

the said LaVerne Chellis, and he, the said JOHN NICHOLAS DONADUCCY, did commit the crime of libel * * *"

It is clear that the indictment in this case meets the standards required in this Commonwealth as set forth, inter alia, in *Com.* v. *Wooden*, 94 Pa. Superior Ct. 452, and *Com.* v. *Bovaird*, 373 Pa. 47, 95 A. 2d 173. It informs any person who reads it that the defendant is charged with publishing in a newspaper, on or about February 18, 1953, an article which was libelous as to LaVerne Chellis. That the defendant so understood it is evidenced by the defense he interposed at the trial. He attempted to show that LaVerne Chellis had in fact done the things attributed to the woman adverted to but not named in the newspaper story, and he attempted to justify publication of the article by stating this his purpose in doing so was to effect a reconciliation between the errant husband and his wife, and for benefit of the public.

The defendant relies solely on *Com.* v. *Swallow*, 8 Pa. Superior Ct. 539, which was also a prosecution for criminal libel. In our opinion, the holding of the Swallow case is of no help to the defendant. In that case the allegedly libelous article read in part as follows: "5. That in the purchase of materials and labor, for making additions, alterations, repairs and refurnishing the Capitol buildings, and cettars and grounds, also for the Executive Mansion, and now for Grace Church, the State has lost many thousands of dollars as the result of an unfair system of competitive bidding. In other words, that the cost to the State has been two, three, four, and as high as eight times in some instances as much as it should have been, and that not all of this money went to the persons furnishing the materials and labor, and further that at least some of

the Board of Public Grounds and Buildings custodians have guilty knowledge of this excessive cost." (Page 545). To explain the persons referred to by "at least some of the Board of Public Grounds and Buildings custodians" the Commonwealth inserted thereafter in the indictment the following: (meaning the said Daniel H. Hastings, Amos H. Mylin, Benjamin J. Haywood and John C. Delaney, and meaning the said Daniel H. Hastings, Amos H. Mylin and Benjamin J. Haywood, as such members of and composing the said board of commissioners of public grounds and buildings, as aforesaid, and the said John C. Delaney, as such superintendent of public grounds and buildings)". (page 560). The indictment was held sufficient.

In the case at bar, the indictment quotes the allegedly libelous article and parenthetically identifies the victim in the manner following: "'A professional keyhole sleuth in quest of philandering evidence about a year ago used binoculars to observe the necking and "maneuvering" going on in the back seat of a car parked in a westside, lakefront ballpark at four in the morning. Its occupants were a 50-year-old Fourth Ward bartender, and a buxom brunette of Latin vintage (meaning LaVerne Chellis), employed by the state to attend the needs of the indigent." To make the instant indictment conform to that approved in the *Swallow* case the Commonwealth need only have inserted a phrase such as "meaning LaVerne Chellis, *as such buxom brunette of Latin vintage.*" It is obviously absurd to hold that the failure of the Commonwealth to draft its indictment in that manner is fatal. The instant indictment and the *Swallow* indictment are equivalents with respect to setting forth the identity of the alleged victim of the libel.

The defendant further contends that the court erred in its charge and, therefore, a new trial should be granted. This matter is not properly before us inasmuch as it was not raised in the court below—understandably so because the defendant made no motion for a new trial. We might add parenthetically, however, that an examination of the charge discloses no error.

The judgment and sentence are affirmed, and it is ordered that the appellant appear in the court below at such time as he may be there called, and that he be by that court committed until he had complied with his sentence, or any part of it which had not been performed at the time the appeal was made a supersedeas.

APPENDIX III

IN THE SUPERIOR COURT OF PENNSYLVANIA

SITTING AT PITTSBURGH

COMMONWEALTH OF PENNSYLVANIA *v.* JOHN NICHOLAS DONADUCY *Appellant*	No. 83 April Term, 1954

CRIMINAL

DOCKET ENTRIES

* * *

DECISION

July 13, 1954

The judgment and sentence are affirmed, and it is orded that the appellant appear in the court below at such time as he may be there called, and that he be by that court committed until he has complied with his sentence, or any part of it which had not been performed at the time the appeal was made a supersedeas.

Ross, J.

* * *

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HAROLD B. WILLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 575

JOHN NICHOLAS DONADUCY,
Appellant,

v.

COMMONWEALTH OF PENNSYLVANIA

MOTION TO DISMISS
JURISDICTIONAL STATEMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 575

JOHN NICHOLAS DONADUCY,
Appellant,

v.

COMMONWEALTH OF PENNSLYVANIA

MOTION TO DISMISS
JURISDICTIONAL STATEMENT

Appellee, Commonwealth of Pennsylvania, in the above entitled case moves to dismiss the Jurisdictional Statement on the grounds that the federal question sought to be reviewed was not timely or properly raised, or expressly passed on and the question presented is so unsubstantial as not to need further argument.

ARGUMENT

In the first instance, as President Judge Evans' opinion (Appendix I of Jurisdictional Statement) reveals only the sufficiency of the indictment was brought into question in the Trial Court. The constitutional questions relative to the Fourteenth Amendment to the U. S. Constitution were never raised at all.

Also, in the Superior and Supreme Courts of Pennsylvania the constitutional questions, if raised at all, were not expressly passed on by the Courts (Appendix II and Appendix III of Jurisdictional Statement).

It is our contention, therefore, that only the constitutional issues raised in lower courts are before the Supreme Court on appeal (*Shelly v. Kraemer,* 334 U. S. 1, 1948). Obviously, in cases from State Courts in which a State statute is assailed as unconstitutional, the United States Supreme Court should refrain from deciding questions not presented or decided in the highest court of the State whose judicial action is under review. (*McGoldrick v. Compagnie Generale,* 309 U. S. 430).

A mere reading of the record reveals that these constitutional questions were either not presented to or, in any event, not decided by the Courts of Pennsylvania and, therefore, the United States Supreme Court should refrain from deciding the questions. (*International Steel & Iron Co. v. National Surety Co.,* 297 U. S. 657).

In the second instance, the question presented is, in actuality, unsubstantial even though, at first blush, it sounds impressive. The Libel Statute of Pennsylvania reads as follows:

> "18 P. S. Sec. 4412. Libel—Whoever writes, prints, publishes or exhibits any malicious or defama-

tory libel, tending either to blacken the memory of one who is dead, or the reputation of one who is alive, thereby exposing him to public hatred, contempt or ridicule, is guilty of libel, a misdemeanor, and on conviction, shall be sentenced to pay a fine not exceeding Five Hundred ($500.00) Dollars, or undergo imprisonment not exceeding one (1) year, or both." Penna. Act of June 24, 1939, P. L. 872, Par. 412, 18 P. S. Sec. 4412.

In essence the "Questions Presented" in Jurisdictional Statement claim the Libel Statute is unconstitutional as "construed and applied (in the Court's charge to the Jury)." This is another way of saying that the Court erred in the charge and that a new trial should be granted. The Defendant, however, never made a motion for a new trial and never challenged the Court's charge in the Trial Court. It is a rather late date to be doing by indirection what one failed to do directly. As we see it, the Libel Statute is not being challenged directly, but only as "construed and applied in the Court's charge to the Jury." The construction and application in the Court's charge to the Jury has never been passed on by any Court because the issue was never raised for no motion for a new trial was filed by this Defendant. Assume the Trial Court's charge was incorrect, which we do not for a moment believe, that does not make the Libel Statute unconstitutional because the Trial Judge's charge is not the law of Pennsylvania unless passed upon and approved by the Appellate Courts.

In conclusion, this attempt to raise a Federal Question which does not, in fact, exist is frivolous and an attempt to do by indirection in the Highest Court in the land what the Defendant failed to do directly in the Trial Court.

CONCLUSION

For the reasons stated above this Court should refuse to note jurisdiction and the judgment below should be sustained.

Respectfully submitted,

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Erie County, Pennsylvania
For Commonwealth of Pennsylvania

APR 1
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 575

JOHN NICHOLAS DONADUCY,
Appellant,

v.

COMMONWEALTH OF PENNSYLVANIA,
Appellee.

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 575

JOHN NICHOLAS DONADUCY,
Appellant,

v.

COMMONWEALTH OF PENNSYLVANIA,
Appellee.

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS

Appellee has filed a Motion to Dismiss the Jurisdictional Statement. The Motion should not be received, for it was not timely filed, having been filed later than the thirty-day period allowed for such filing in Rule 16(1) of this Court's Rules. Nonetheless, we deal below with the argument presented by appellee.

Appellee states that the constitutional questions herein were neither presented to nor decided by the courts of Pennsylvania. However, appellant has pointed out in the Jurisdictional Statement that the constitutional ques-

tions were raised in both the Superior and Supreme Courts of Pennsylvania, and were passed upon (pp. 8-11).

Appellee cites three cases in support of his position that this Court does not possess jurisdiction because the questions were not expressly passed upon by the courts below. However, the Superior Court of Pennsylvania, from whose judgment this appeal is taken, did state that the charge was a correct one (R. 24). And the constitutional issues presented herein all arise from the trial court's construction in the charge of a state statute.

We point out, moreover, that the cases cited are in no way any authority for appellee's position that this Court's jurisdiction fails if the federal questions were not *expressly* decided below. *Shelly* v. *Kraemer*, 334 U. S. 1 (1948), had nothing to do with the problem, the only relevant language in the opinion being that only the issue raised in the lower courts could be before the Court. *Id.* at 8-9. The Court in that case did not mention any requirement of an express decision on the part of the courts below. Similarly, in *McGoldrick* v. *Compagnie Generale*, 309 U. S. 430 (1940), the Court held that there was no jurisdiction only because the constitutional questions had not been presented *or* decided in the highest court below. *Id.* at 433-434. So, too, in *International Steel & Iron Co.* v. *National Surety Co.*, 297 U. S. 657 (1936), the Court held that there was no jurisdiction because the record failed to show that the constitutional question had been presented *or* decided. *Id.* at 662. And the Court nonetheless granted a continuance to afford the opportunity for amplification of the record. *Ibid.*

Appellee advances the astonishing proposition that the trial judge's charge is not the law of Pennsylvania. We point out that the trial judge's charge was specifically approved by the Superior Court of Pennsylvania. Surely

a judicial construction of statutes approved by a state intermediate appellate court, when review is denied by the state Supreme Court, constitutes the law of the state.

CONCLUSION

This Court should note probable jurisdiction and reverse the judgment below.

Respectfully submitted,

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APRIL 25, 1955.

Decisions Per Curiam.

No. 575. DONADUCY *v.* PENNSYLVANIA. Appeal from the Supreme Court of Pennsylvania, Western District. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. MR. JUSTICE BLACK dissents. *Herbert Monte Levy* for appellant. *Wayne A. Gleeten* for appellee. Reported below: See 176 Pa. Super. 27, 107 A. 2d 139.